United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

NO. 75-4169

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

On Petition for Review of an Order of
the Civil Aeronautics Board

BRIEF FOR INTERVENORS
NATIONAL AIR CARRIER ASSOCIATION, INC.
CAPITOL INTERNATIONAL AIRWAYS, INC.
OVERSEAS NATIONAL AIRWAYS, INC.
SATURN AIRWAYS, INC.
TRANS INTERNATIONAL AIRLINES, INC.
WORLD AIRWAYS, INC.

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STATEMENT OF THE ISSUE PRESENTED

Whether one-stop inclusive tour charters, as authorized by the Civil Aeronautics Board in the regulations under review, constitute "charter trips, including inclusive tour charter trips, in air transportation" within the meaning of the Federal Aviation Act's definition of "supplemental air transportation."[1]

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[1] Federal Aviation Act of 1958 (72 Stat. 731), as amended, 49 U.S.C. §§ 1301 *et seq.* Section 101(36) of the Act, 49 U.S.C. § 1301(36), defines "Supplemental air transportation" to mean "charter trips, including inclusive tour charter trips, in air transportation, other than the transportation of mail by aircraft, rendered pursuant to a certificate of public convenience and necessity issued pursuant to section 401(d)(3) of this Act to supplement the scheduled service authorized by certificates of public convenience and necessity issued pursuant to sections 401(d)(1) and (2) of this Act."

STATEMENT OF THE CASE

This case presents for review regulations of the Civil Aeronautics Board, adopted on August 7, 1975 after extensive rulemaking proceedings, which permit U.S. certificated air carriers and foreign air carriers to perform one-stop inclusive tour charters (OTC's), as defined in the Board's regulations.

Intervenor National Air Carrier Association, Inc. (NACA), a trade association of U.S. supplemental (i.e., charter) airlines, participated in the proceedings before the Board on behalf of its member airlines. NACA and its member carriers have intervened here in support of the Board's decision to authorize OTC services.

Background

The issuance of the charter rules under review marks a major step in the Board's effort – begun in 1971 – to reexamine the existing restrictions on charters so as to "more effectively encourage the development of the economics of planeload operations while preserving a reasonable balance between scheduled and charter services" (2a).[2]

Prior to 1971, the Board's regulations limited charters to essentially two types. One was the "prior affinity" charter, which is a flight contracted for by a pre-existing organization formed primarily for purposes other than travel and made available only to its bona fide members and their families. See 14 C.F.R. Parts 207, 208, 212 and 214. The other was the three-stop inclusive tour charter (ITC), which is a flight chartered by an independent tour operator who markets a travel package to members of the general public consisting of air transportation, hotel accommodations and other ground arrangements. 14 C.F.R. Part 378.[3]

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[2] References are to the Board's regulation under review as set forth in Petitioner's Appendix.

[3] The ITC regulations establish the following requirements:

(1) A minimum of seven days must elapse between departure and return;

(Continued)

The prior affinity rules, as the Board and the courts have recognized, are inherently discriminatory – since they limit the advantages of low-cost charter transportation to those who happen to be members of particular groups – and have also proven to be difficult to enforce (see 2a; *Pan American World Airways, Inc. v. CAB*, 517 F.2d 734, 737 (2d Cir. 1975)). With respect to the ITC regulations, the Board has found that the "rigorous conditions" attached to this mode – "i.e., three-stop tour packages whose minimum price must exceed the lowest available scheduled air fare for the tour itinerary" – "had severely limited its popularity" (2a).[4]

In view of these considerations, the Board in 1971 instituted a rulemaking proceeding which led to the development of a new type of charter – the travel group charter (TGC) – which was not premised on pre-existing membership in an organization. The TGC rules, which were upheld in *Saturn Airways, Inc. v. CAB*, 483 F.2d 1284 (D.C. Cir. 1973), permitted the chartering of not less than 40 seats by a group of persons, formed by a charter organizer, who are required to purchase their transportation a substantial period in advance of departure and to travel together on a round-trip flight, and who must each pay a pro rata portion of the charter price (including the cost of unsold seats).[5] 14 C.F.R. Part 372a.

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[3](Continued)

(2) The land portion of the tour must provide overnight hotel accommodations at a minimum of three places other than the point of origin, such places to be no less than 50 air miles from each other;

(3) The tour price must include all hotel accommodations and necessary air or surface transportation between all places on the itinerary;

(4) The tour package price must be no less than 110 percent of the lowest available fare charged by a scheduled air carrier for comparable individually ticketed service.

[4] ITC's accounted for 14% of U.S. international passenger charter flights in 1974 (86a).

[5] The TGC rules were subsequently amended, in 1973, so as to authorize the performance of certain foreign-originating TGC's and advance-booking charters (TGC/ABC's) organized in accordance with the rules of the country of origin. The TGC/ABC rules were upheld by this Court in *Pan American, supra*, 517 F.2d 734.

On the basis of its experience with TGC's, however, the Board concluded that because of the restrictive requirements – particularly the requirement that each participant bear a pro rata share of the charter costs which gives rise to "complicated formulae" for ascertaining the price of the trip – "the TGC rule has failed to provide either a satisfactory alternative to affinity charters, or the substantially increased charter availability that we had sought" (2a-3a).[6]

Accordingly, in a Notice of Proposed Rule Making issued October 30, 1974,[7] the Board proposed a one-stop inclusive tour charter rule "as a further step in the efforts to supplant the affinity rules with workable, nondiscriminatory, and enforceable alternatives" (3a). The proposal involved eliminating the TGC requirement that each participant share fully in the cost of unsold seats – thereby allowing the tour operator to assume this risk and to market the charter to participants at a fixed price[8] – and reducing the length of the advance-purchase requirements. On the other hand, the proposed rules required, unlike the TGC rules, that the participants purchase a tour package, including ground accommodations, subject to a minimum-price requirement. On the basis of comments received, the Board issued a Supplemental Notice of Proposed Rule Making on April 10, 1975,[9] embodying certain modifications to the original proposal, and after further comments were received, adopted the rules proposed in the Supplemental Notice with further modifications. (Regulation SPR-85, adopted August 7, 1975; 1a-101a.)[10]

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[6] TGC's accounted for only one percent of U.S. international passenger charter flights in both 1973 and 1974 (86a).

[7] EDR-281/SPDR-38/ODR-9, 39 Fed. Reg. 39572.

[8] The Board's TGC/ABC rules permit charters under foreign-country rules that also provide for a fixed (rather than a pro rata) price to the participant. See *Pan American, supra,* 517 F.2d at 741-42.

[9] EDR-281B/SPDR-38B/ODR-9B, 40 Fed. Reg. 17039.

[10] The Board's regulation also includes rules for so-called special event charters (SEC's), which rules are applicable only in situations where the duration of the trip is less than the minimum permissible for OTC's, and which require prior authorization by the Board for each individual SEC program (1a, n. 1; 27a-30a; 65a-69a). This new and narrowly-defined charter mode is evidently not challenged by TWA (see, e.g., TWA brief, p. 1) and, accordingly, will not be discussed further herein.

The Board's Decision

The principal legal issue argued by the parties in the proceeding before the Board was whether (as contended by NACA and others) OTC's are "charter trips" within the meaning of the Act, or whether (as argued by *some* of the scheduled carriers) they constitute individually-ticketed transportation which cannot be performed by supplemental air carriers.

In its decision adopting the rules as proposed in its Supplemental Notice and modified in the final order, the Board identified the travel-together, round-trip, advance-purchase, minimum-stay, and ground-package requirements as conditions whose cumulative effect "distinguish[es] these charters from the operation of what one would normally associate with individually ticketed service" (12a). More specifically, the rules include the following restrictions (none of which are applicable to conventional individually-ticketed service) (12a, 46a-48a, 52a):

(1) OTC charter contracts must be for at least 40 seats, and participation is limited to persons whose names are contained in a passenger list filed with the Board at least 15 days prior to departure in the case of North American OTC's and 30 days in the case of OTC's outside North America.[11] The tour operator must certify at that time that each person listed has entered into a contract and has made full payment of the total price of the tour.

(2) OTC participants must commit themselves to specific departure and return flights, and their ability to cancel or to obtain a refund will be subject to such additional terms as the tour operator may choose to apply.[12]

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[11] The advance-filing requirement will be reduced to 7 days for North American charters effective October 1, 1978, but no future reduction is provided with respect to the 30-day advance-filing period for charters outside North America (19a).

[12] The Board pointed out that while the OTC rules do not in terms impose forfeiture requirements in the event a customer is unable to depart as planned, those rules, together with the direct air carriers' cancellation provisions, "will have the effect of causing OTC operators to impose sizeable forfeiture requirements in the event the consumer is unable to depart as planned" (see 6a, n. 14; 13a, n. 22). The Board noted, by way of comparison

(Continued)

(3) All participants must travel together as a group on both legs of the flight, on all ground transfers between airports and hotels, and between destination points on the tour. There can be no intermingling of passengers from different groups (i.e., a participant cannot depart with one group and return with another) and no one-way passengers.

(4) Participants are subject to the predetermined fixed restrictions on tour length established by the tour operator, which may be no less than four days for North American tours and seven days for all other tours.

(5) OTC participants must purchase, as part of the OTC price, specific accommodations and specific ground services selected by the tour operator, and the cost to each participant may not be less than the seat price (i.e., the price specified in the charter contract divided by the total number of seats specified in the charter contract) plus $15 for each night of the tour.[13]

In concluding that a rule containing these restrictions and limitations "adequately maintains the necessary distinctions between the two types of service" (14a), the Board pointed out that individually-ticketed passengers (in contrast to OTC participants)

> "may make reservations at any time; they are free to cancel, change, and rebook reservations without penalty; they may purchase either a one-way or a round-trip ticket; and they may revise their plans or rearrange their itineraries at any time. In addition, they need not stay at their destination for any particular period of time, and may delay or accelerate their return plans at will. Further, there is no requirement that they pur-

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[12] (Continued)
that ITC operators generally provide that any cancellation within 60 days of departure results in a substantial penalty (unless a substitute is found), and any cancellation within 30 days means a forfeiture of 50% or more of the ITC price – notwithstanding that ITC packages can be sold up to the day of departure (6a, n. 14). The Board also pointed out that an OTC participant who fails to make the return flight is not entitled to a refund of the portion of the tour price attributable to the return-trip costs. (*Ibid.*)

[13] A $7.50 per night minimum is allowed in the case of children under 12 years who share a hotel room with an adult (47a-48a).

> chase land accommodations in addition to air transportation, or that they stay at any particular hotel." (13a; footnote omitted.)

The Board also rejected the contention advanced by some scheduled carriers that when Congress amended section 101(33) of the Act (now section 101(36)) specifically to include "inclusive tour charter trips" in the definition of "supplemental air transportation,"[14] it meant to limit such charters to the three-stop tours for which the Board's regulations at that time provided. Rather, it concluded from the legislative history that the purpose of the 1968 amendment was to clarify the Board's existing authority to reasonably define the term "charter" so long as it preserved the distinction between charter and individually-ticketed service (11a). The Board cited in this regard the report of the House Committee on Interstate and Foreign Commerce (H. Rept. No. 1639, 90th Cong., 2d Sess. (1968), at 3) which states:

> "We recognize that shifting economic conditions and the public convenience and necessity may require modifications in the [inclusive tour charter] regulations. We do not undertake here to proscribe the usual rulemaking procedures of the CAB, and will leave the Board with its present flexibility, which must be exercised within the confines of the statute, due process, and full participation on the part of interested parties in the Board's rulemaking proceedings." (11a-12a)

In addition, the Board was not persuaded, either on the basis of experience or the presentations in the instant proceeding, by "the claims of ruinous diversion or overall financial harm" advanced by certain scheduled carriers in opposition to the proposed rule, noting that the same claims had been advanced on numerous other occasions, and had proven not to be true (5a). It pointed out in this regard that "charter traffic constitutes only a small part of the total traffic in the U.S. transportation system" (5a).[15] The Board

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[14] Pub L. 90-514, 82 Stat. 867.

[15] In 1974 revenue passenger-miles (RPMs) flown in civilian charter service in domestic markets amounted to only 4% of total domestic RPM's (82a). Even in the transatlantic market – by far the largest civilian charter market (see 1a) – charters account for only one-fourth of the traffic (84a) .

found, moreover, that scheduled carriers – which historically have "outcarried the supplementals in respect to charter traffic" – "are likely to carry the lion's share" of the OTC traffic (5a). Indeed, concluded the Board, "there is every reason to expect that on an overall basis OTC's will mean profits to the scheduled industry, not losses, in part because OTC's will provide an expanding traffic base for the industry at a time when it is faced with overcapacity" (5a).

Further, the Board stressed that it was adopting the OTC rule on an experimental basis, and that "as an additional precautionary measure," provision had been made for *post hoc* procedures for monitoring and control of OTC operations in individual markets (7a). In the event of threatened injury to scheduled service in a particular market, "the Board will have ample power to remedy the problem" (7a). "And finally," the Board pointed out, "we of course retain the ability to terminate the OTC experiment outright, and are prepared to do so shou untoward consequences develop" (7a).

Lastly, the Board stated that although it had originally proposed an OTC rule because of the need to find effective alternatives to the affinity rules and to provide a reasonable outlet for the ever-increasing demand for low-cost charter services, a further consideration warranting adoption of an OTC rule was provided by "profound recent changes" in the air transportation situation (9a). These included the fact that since about 1970 airline unit costs had been increasing; that air fares had been increasing since 1973 at a faster rate than per-capita income; and that the rate of passenger traffic growth had slowed significantly since 1973. The Board found no prospect of substantial change for the better in these post-1970 trends, particularly with fuel costs likely to rise even higher. It concluded, in view of these circumstances, that an essential course of action "is to encourage operations tailored to full planeload movements" (10a). As the Board stated:

> "Traditional scheduled services inherently must operate with substantial numbers of empty seats, and, accordingly, at prices

> much higher than planeload services can offer. It is because of that that, with a few exceptions based on promotional fares, a charter passenger today can ride at far less cost than a scheduled passenger ever did. It is therefore our judgment that reducing the historical restrictions imposed by the Board on the operation of charter services is of particular importance if the dynamic growth of air travel that until recently characterized our air transportation system is to be resumed." (10a)

ARGUMENT

ONE-STOP INCLUSIVE TOUR CHARTERS AS DEFINED IN THE BOARD'S REGULATION CONSTITUTE "CHARTER TRIPS" WITHIN THE MEANING OF THE FEDERAL AVIATION ACT

As this Court has recently pointed out, the term "charter" is not defined by the Federal Aviation Act, but rather is "subject to the Board's construction which must maintain the basic distinction between group travel by charter and individually ticketed travel of the sort normally associated with scheduled point-to-point service." *Pan American World Airways, Inc. v. CAB*, 517 F.2d 734, 736 (2nd Cir. 1975). Given this limitation, the Board "'should be free to evolve a definition in relation to such variable factors as changing needs and changing aircraft. . . .'" *Ibid.*, quoting from *American Airlines Inc. v. CAB*, 348 F.2d 349, 354 (D.C. Cir. 1965).

In formulating the OTC rules, we believe, the Board has clearly maintained the distinction between charter service and individually-ticketed transportation, and its regulations represent a most appropriate exercise of its responsibility to evolve a definition which is responsive to current needs. TWA's contentions to the contrary simply ignore the significance of the restrictions which the Board has included in defining OTC's, and are also based upon mistaken assumptions concerning the proper role of supplemental air carriers – assumptions which were flatly rejected by this Court in *Pan American*.

A. The OTC Rules Adequately Distinguish Charter and Individually-Ticketed Service

TWA's contention that the OTC rules do not preserve the distinction between charter and individually-ticketed service is based largely upon the fact that the OTC restrictions are not the same as those imposed on other charter modes which have previously been approved by Congress and the courts (see TWA brief, pp. 10-11, 14-19).

This same type of argument, however, was found unpersuasive by this Court in *Pan American,* which agreed with the District of Columbia Circuit, in *Saturn Airways, Inc. v. CAB,* 483 F.2d 1284 (1973), that no specific restriction is a prerequisite to a valid charter, and that the proper focus is whether "[v]iewed as a whole, the various restrictions and limitations imposed" in a particular regulation "maintain substantial and vital differences" between charter and conventional individually-ticketed service. 517 F.2d at 742. In *Pan American,* as in *Saturn,* "the court's focus was on the cumulative effect of the entire set of restrictions . . . ." *Ibid.*[16]

Moreover, the fact is that the OTC restrictions *are* in large part of the very same character as those which have previously been found by the courts to be significant, and in some respects are more stringent than those applicable to other previously-approved charter modes.

To begin with, the OTC rules require, as do those governing TGC's and foreign-originating TGC/ABC's, that the charter involve a contract for at least 40 seats, that the participants must be subject to predetermined fixed restrictions on the length of their trips, and that they must depart and return together as a group, with no intermingling of groups and no one-way passengers. While TWA chooses not to regard these as meaningful restrictions, this

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[16] The scheduled airlines had contended in *Saturn* that a "prior affinity" requirement was essential, and in *Pan American* that pro rata pricing (among other things) was indispensable. In each case, their contention was rejected. *Saturn Airways,* 483 F.2d at 1292-93; *Pan American,* 517 F.2d at 741-42.

Court in *Pan American* concluded that restrictions of the very same character create a "sharp contrast" to the situation of an individually-ticketed traveler. Such a traveler, the Court pointed out, "may purchase a one-way or round trip ticket. He need not be 'locked' into any specified length of stay or date of return. The individually ticketed passenger can cut short his trip, extend it, make up his mind when to return after he reaches his destination, or decide not to return at all." 517 F.2d at 742.

In addition, the OTC rules impose -- again as do the TGC and TGC/ABC rules – an advance-purchase requirement.[17] While shorter than the 90-day requirement (now 60 days) for TGC's and TGC/ABC's,[18] the OTC advance-purchase requirement is nevertheless substantial and, as pointed out in *Pan American,* is not a requirement which is characteristic of conventional individually-ticketed service. As this Court stated, "[i]ndividually ticketed travelers . . . need not incur any contractual obligation prior to the flight. They are free to reserve, change their reservations, and cancel when they please." 517 F.2d at 742.

TWA deals with the advance-purchase restriction by pretending that it doesn't exist. Thus, the carrier asserts that the rule "contains no requirement that participants be contractually bound to pay for the flight" (Brief, p. 18). The rules state quite plainly, however, that not only must each participant have entered into a contract with the tour operator prior to the advance fil-

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[17] As noted above, the OTC rules require that the list of passengers be filed at least 30 days in advance of departure in the case of trips outside North America, and at least 15 days in advance for North American trips. In order to complete the necessary paper work and allow time for filing prior to the deadline, the tour participant would in practice have to make a firm commitment to join the tour and pay the entire amount well in advance of the stated deadline.

[18] By Regulation SPR-78, adopted August 12, 1974, 39 Fed. Reg. 29345, the Board reduced the advance-filing requirement from 90 to 60 days, because the then-existing rules had rendered TGC's "virtually unmarketable." (SPR-78 at 17; 39 Fed. Reg. at 29347.) TWA and Pan American petitioned for review of the Board regulation in this Court (No. 74-2330, filed October 15, 1974), but entered into a stipulation of voluntary dismissal in June 1975, following the decision in *Pan American.*

ing of the passenger list, but also that full payment must have been made by that time (52a).

It is true that the OTC regulations do not in terms prohibit a tour operator from making a refund to a participant who is unable to make the trip (see p. 5 & n. 12 *supra*). But this is also true of the rules for foreign-originating TGC/ABC's. See *Pan American,* 517 F.2d at 741-42. Moreover, the Board fully anticipates that "the OTC requirements (together with the direct air carriers' cancellation provisions) will have the effect of causing OTC operators to impose sizeable forfeiture requirements in the event the consumer is unable to depart as planned" (6a, n. 14; see also 13a, n. 22; 36a).[19] Its expectation in this regard is well supported by experience under the ITC rules where, despite the fact that there is no advance-purchase requirement and trips can be sold up to the date of departure, ITC operators generally impose substantial penalties for cancellation – in many cases "a forfeiture of 50% or more of the ITC price" (6a, n. 14). It is even more likely that OTC operators will impose similar (or more stringent) forfeiture requirements because their selling period terminates at the time of the advance-filing deadline and no substitution of participants is allowed after that date (18aa, 47a).[20] Thus, an OTC participant is not only unlikely to obtain a refund if he is unable to depart as planned, but also, unlike TGC or TGC/ABC participants, he has no chance to assign his place to a substitute.

Lastly, the OTC rules contain an additional and fundamental restriction not contained in the TGC or TGC/ABC rules – a restriction that is also not

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[19] The Board's finding here is analogous to its finding in the TGC/ABC proceeding that organizers of foreign-originating TGC/ABC's "will undoubtedly, in their own economic interest, include" forfeiture provisions in participants' contracts, even though such provisions are not mandated by the rules. (Regulation SPR-74, adopted March 15, 1974, at 9, n. 6a; 39 Fed. Reg. 10886, 10890.)

[20] An added reason for the imposition of stringent forfeiture requirements by tour operators is a provision in the rules which prohibits cancellation of OTC trips due to inadequate participation after the passenger list has been filed (55a).

associated with conventional individually-ticketed service. This is the requirement (sometimes called a tour-basing requirement) that the OTC price must include the cost of ground accommodations and services for the duration of the tour – defined to include at a minimum sleeping accommodations for each night of the tour as well as necessary surface transportation during the tour (42a, 47a). To give force to this requirement and assure that "throw-away" ground accommodations are not offered, the rules also include a minimum-price restriction applicable to the total tour price. By contrast, the conventional individually-ticketed passenger pays only for his air fare and is free to make such sleeping and other ground arrangements as he chooses.

The significance of a tour-basing requirement in distinguishing individually-ticketed transportation was plainly recognized by Congress when, in 1968, it adopted Public Law 90-514, amending the Federal Aviation Act to make clear that the term "charter trip " was intended to encompass "inclusive tour charter trips" (see discussion of the 1968 amendment in *Pan American,* 517 F.2d at 743). As stated in the Senate Commerce Committee report on the legislation, "[i]f a travel agent charters an aircraft for an all-expense-paid tour and then offers to individual members of the public the right to participate as a member of the group, this is a very different sort of service from individually ticketed transportation." (S. Rept. No. 1354, 90th Cong., 2d Sess. (1968), at 7, quoting and reaffirming S. Rept. No. 688, 87th Cong., 1st Sess. (1961), at 14.)

While TWA is evidently of the view that the 1968 amendment was intended only to approve the three-stop ITC charter mode which the Board had previously adopted (see Brief, pp. 6-11), that is plainly not the case. As the Board pointed out in adopting the instant rules, there was express recognition by Congress "that shifting economic conditions and the public convenience and necessity may require modifications in the [existing] regulations," as well as a clear statement of Congressional intent "not . . . to proscribe

the usual rulemaking procedures of the CAB" but to "leave the Board with its present flexibility" (11a-12a, quoting H. Rept. No. 1639, *supra*, at 3).[21]

Although there were expressions of Congressional concern that any changes in the Board's ITC regulations must maintain the distinction between charter and individually-ticketed service,[22] the regulations now under review clearly do so for the reasons we have discussed. In addition, while the present regulations have been formulated so as to render inclusive tour charters more marketable, they nonetheless contain essentially the same types of restrictions as the ITC rules which were in effect when Public Law 90-514 was adopted, including tour-basing, minimum-stay, and minimum-price requirements. Only the three-stop requirement – which as the Board found, has severely limited the attractiveness of the ITC mode – has been eliminated in the OTC rules.[23] On the other hand, the latter include a limitation never placed on the ITC – an advance-purchase requirement, which is in itself a restriction of considerable significance in distinguishing individually-ticketed transportation.

We think it evident, therefore, that while the Board, mindful of past experience, wisely determined "not [to] risk dooming the new OTC rule to failure by rendering it unmarketable" (4a), the regulation has been drafted in

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[21] While Representative Staggers, Chairman of the House Interstate and Foreign Commerce Committee, did explain the legislation in terms of the existing three-stop ITC rules (see quotation at p. 9 of TWA brief), the above statement from the House Committee report refutes any notion that this was the *only* form of inclusive tour charter that the law was intended to permit. TWA's view is also contradicted by the statement of Representative Springer, the ranking minority member of the Committee, that "[i]t is best that the Board, which watches over the economic well-being of the entire industry on a continuing basis, be allowed to change rules and regulations concerning tours in the light of possible changes in economic considerations not now foreseeable." (114 Cong. Rec. 25053 (1968).) See also, the remarks of Representative Moss, a member of the Committee, pointing out that the committee report language contemplated "modifications to the present regulations concerning inclusive tour charter trips" so long as the distinction between "the inclusive tour charter services of the supplementals and the point-to-point, individually ticketed scheduled services of the route carriers" is clearly maintained. (*Ibid.*)

[22] See H. Rept. No. 1639, *supra*, at 3, 4.

[23] The OTC rules also contain a different form of minimum-price limitation than the OTC rules – i.e., one not tied to fares in scheduled service.

a manner that assures that OTC service will be "'of a kind and character which does not amount to conventional . . . service as provided by the major airlines'" (*Pan American,* 517 F.2d at 741, quoting from S. Rept. No. 1567, 86th Cong., 2d Sess. (1960), at 5.) The instant regulation thus constitutes "a lawful evolution of the charter definition" (*Pan American,* at 741). See *American Airlines, Inc. v. CAB, supra,* 348 F.2d at 354. If any possible doubt should exist on this score, the Board has made clear that it has adopted the OTC rule "on an experimental basis," accompanied by procedures for monitoring and control, and a readiness "to terminate the OTC experiment outright" should that become necessary (7a). Clearly, this is "the best way to test the true effects" of OTC's (*Saturn Airways,* 483 F.2d at 1293). See also, *Pan American,* 517 F.2d at 745 ("If the traffic patterns are not as predicted, the Board remains free to adjust its regulations to unexpected results.")

B. The OTC Rules Properly Recognize the Need for Effective Competition in Air Transportation and the Appropriate Role of the Supplemental Carriers in Providing Low-Cost Bulk Air Travel

It is apparent from TWA's brief that, in its view, the real vice of the OTC regulations is that in "mak[ing] low-cost bulk air travel more available to the traveling public" (18aa), they provide the supplemental carriers with increased opportunity to compete with the scheduled carriers (see TWA brief, pp. 12, 13).

While such competitive considerations are largely irrelevant to the lawfulness of the OTC rules so long as the rules maintain (as we believe they clearly do) the necessary distinction between charter and individually-ticketed service, it is nonetheless important to point out that TWA's views concerning competition in the bulk air transportation market, and its conception of the role to which the supplemental carriers should be confined, have been firmly rejected by the courts and the Board.

It is settled not only that charter transportation may properly involve solicitation of the general public (*Pan American,* 517 F.2d at 743), but also that there should be vigorous competition between scheduled and supplemental carriers in the bulk air transportation market. As both this Court and the District of Columbia Circuit have recognized, "'the existence of a market structure conducive to maximum feasible competition' between scheduled and supplemental carriers 'is the highest and best definition of both our national and consumer interest in the conditions under which international air transportation is to be carried on.'" *Pan American,* 517 F.2d at 744, quoting from *National Air Carrier Association v. CAB,* 442 F.2d 862, 872 (D.C. Cir. 1971).[24] "The legislative history of the 1962 amendments of the Act indicates that the supplementals are not 'second class,' but that they are to provide the public with 'convenient and adequate air transportation' and 'achieve a permanent and stable place in our air transportation system.'" *Pan American,* 517 F.2d at 743-44. It is evident that neither "maximum feasible competition" nor fulfillment of the role contemplated by Congress for the supplemental carriers can take place if those carriers are confined (as TWA would have it) to charter modes which are so restrictive that, as the Board found, "large numbers of Americans have never had a real opportunity to express in the marketplace their attitudes toward charter services" (2a).

Despite TWA's apparent distaste for making "low-cost bulk air travel more available to the traveling public," that is a legitimate goal of the Board. "The actions of the Board in this area have provided for steady growth in

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[24] In the cited case, the District of Columbia Circuit quoted with approval the position expressed in the *Statement of International Air Transportation Policy of the United States,* approved by the President, June 22, 1970, that "[b]oth scheduled and supplemental carriers should be permitted a fair opportunity to compete in the bulk transportation market." 442 F.2d at 864-65. See also *Transatlantic Supplemental Charter Authority Renewal Case,* Order 72-5-9, approved April 20, 1972, where the Board stated (mimeo. opin. at 6) that "[o]ur approach recognizes that both scheduled and charter services are integral elements of international air transportation fulfilling a legitimate and vital role, and that scheduled carriers and supplementals each have a right to compete for transatlantic bulk traffic" (quoted in *Pan American,* 517 F.2d at 744).

both the scheduled and supplemental markets, and the public, as it should be, has been the primary beneficiary." *Saturn Airways*, 483 F.2d at 1292. As this Court has recognized, the Board's responsibility for "[e]ncouragement and development of an economically sound air transportation system" requires that it take into account "the public interest in low cost travel . . . ." *Pan American*, 517 F.2d at 746.

In light of this responsibility – and in view of the Board's findings concerning both the failure of its earlier rules to provide adequate charter availability and the new urgency "to encourage operations tailored to full plane-load movements" (10a) – it is evident that the Board has acted in a reasonable and lawful fashion in adopting the charter regulation now under review.

CONCLUSION

For all of the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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January 29, 1976

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

No. 75-4169

CERTIFICATE OF SERVICE

I hereby certify that I have served by hand (by mail) two copies of the Brief for Intervenors National Air Carrier Association, Inc., Capitol Airways, Inc., Overseas National Airways, Inc., Trans International Airlines, Inc., World Airways, Inc. in the above-entitled case, on the following counsel of record, this 29 day of January 1976.

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